

built up space. Since the defendants have set a price of \$425,000 for 2,100 sq ft of built up space in a flat, there is no reason why I should not apply the general rule referred to by the Master of the Rolls in *Hill v Buckley*.¹³ To adopt his Lordship's words, 'a rateable abatement of the price will probably leave both in nearly the same relative situation in which they would have stood if the true quantity had been originally known ...'.

When a developer sells a flat, he is not selling four walls of concrete nor is the purchaser buying four walls of concrete with a ceiling. He is selling and the purchaser is buying *living* space. Every square foot counts to a purchaser as that is what he is buying. Moreover, he is paying a relatively high price for such living space. There is also authority for the rule that where the parties have set higher values upon some parts of the property than upon others, a proportionate abatement is not strictly appropriate, and account is taken of the value of the particular part or parts of the property not available to the purchaser: see Peter Butt, *ibid*, at p 102, and also *Hill v Buckley*.¹³ In the case of a flat, some parts of it may well be of less value than other parts, but in the absence of any evidence to the contrary, I can only apply a rateable abatement.

I am also unable to accept Miss Ng's evidence that the abatement should be 5%-8% of the purchase price. I do not accept her evidence on the existence of a practice amongst valuers of adjusting discrepancies in built up areas of flats by 5-8% is satisfactory as expert evidence. If there were such a practice, I do not think that it should be applied in the present case without evidence justifying first the correctness of that range of adjustment for flats and second its application to discrepancies in areas of flats in the range of 1,700-2,100 sq ft. Miss Ng has not said that the general rule that the larger the land the lower the price per square foot is generally applicable to flats.

For the above reasons, I allow the plaintiffs' claim of \$70,023.80 by way of proportion abatement on the purchase price of \$425,000, with interest thereon at the rate of 6% pa from the date of completion up to today, and costs to be taxed. There will also be similar orders for such amounts as are appropriate in Suit Nos 1660/85, 1661/85, 1662/85, 1668/85, 1688/85, 1689/85, 1690/85, 2027/85, 2028/85 and 3208/85.

Order accordingly.

Solicitors: YH Cheong, Yap & Yap.

Reported by Terence Tan Bian Chye

A Lee Nellie v Wong Lai Kay

HIGH COURT (SINGAPORE) — SUIT NO 4332/86
YONG PUNG HOW J
8 MARCH 1990

Trusts and Trustees — Express trust — Creation of — Sum of money given to defendant — Property transferred to defendant 'in consideration of natural love and affection' — Whether transfer of property operated as gift inter vivos — Whether defendant a trustee for the plaintiff over money and property

In this action, the plaintiff seeks an order that the defendant, her son, retransfer to her a property which she had previously transferred to him, and also to repay to her a sum of \$40,000 which she had previously handed over to him. The property had been transferred, and the money given to the defendant at a time when the plaintiff was being investigated by the police for carrying out illegal abortions, in the course of which her identity card was taken from her by the police. No payment was made by the defendant for the property, and the transfer instrument recited that it was in consideration of natural love and affection. Although the plaintiff was the transferor, the costs of the transfer, including stamp duty, registration and legal fees, were paid by the defendant out of the \$40,000 the plaintiff had previously handed over to him.

The plaintiff alleges that in fact the transfer of the property only happened because of her problems at the time with the police and the holding by them of her identity card. Taking advantage of her personal circumstances and her frame of mind, the defendant had suggested to her that if she was arrested again the property could be confiscated, and the defendant had advised her that to protect the property she should transfer it to him temporarily. The plaintiff did get back her identity card after the police had dropped all charges against her. Following this, she asked the defendant to retransfer the property back to her. He agreed to do so at first, but avoided doing anything about it. The defendant denies that the property was transferred to him on these conditions, and claims that it was an outright gift *inter vivos*, being the free and intelligent act of the donor. The issue before the court was whether the property was transferred to the defendant as a gift, in consideration of natural love and affection, or whether it was transferred to the defendant only on the condition, which he accepted at the time, that the property was to be returned to her when she got back her identity card, or, in other words, that the property was only to be held by him as a trustee of the property for her use and benefit during her lifetime and to be retransferred back to her, and the trust to be terminated, if and when she got back her identity card.

Held, allowing the plaintiff's application:

(1) The court accepted the evidence of the plaintiff as being the correct version of the background and reason for the transaction over the property. She had the more difficult story to tell the court, but she told it simply and, in the court's opinion, truthfully. The defendant's own evidence showed that for a long time the plaintiff was clearly in such a distressed frame of mind that she could have been easily persuaded to transfer her remaining property on trust to the defendant to avoid losing it altogether.

(2) In the court's judgment, there can be no doubt that the \$40,000 was handed over to the defendant for the purpose alleged by the plaintiff. The defendant was in fact in the position of a trustee for the plaintiff in respect of this money, and was under a fiduciary duty to preserve it in accordance with the terms

of the express trust imposed on it, which he had accepted. He must therefore return to the plaintiff \$35,775.50 being \$40,000 less \$4,224.50 which was paid for the plaintiff's legal fees.

(3) The defendant is also a trustee for the plaintiff of the property. The trust is a simple express trust which the plaintiff, as settlor, created orally for her own benefit, with a provision for revocation; in the event of her death (before the identity card was returned to her), the defendant, having accepted trusteeship, would not have benefited personally but would have had to hold on trust for the deceased's estate.

[Editorial Note: The defendant has appealed to the Court of Appeal vide Civil Appeal No 35 of 1990.]

Cases referred to

- 1 *Hooi Cheng Kwong & Anor v Paul Hooi* [1981] 2 MLJ 306 (refd)
- 2 *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32 (refd)
- 3 *Ksenia Otremsky v Alexander Otremsky* [1981] 2 MLJ 301 (refd)
- 4 *Allcard v Skinner* (1887) 36 Ch D 145 (distsd)

Ann Tan (G Krishnan with her) for the plaintiff.
Dennis Singham for the defendant.

Cur Adv Vult

Yong Pung How J: This is an action in which the plaintiff, Lee Nellie, seeks an order that the defendant, Wong Lai Kay, who is her son, retransfer to her a property at 28 Jalan Novena Selatan which she had previously transferred to him, and also repay to her a sum of \$40,000 which she had previously handed over to him.

The plaintiff is now 69 years old, and has been widowed since she was 37. She used to be a registered midwife, but at some time when business was bad she had turned to performing illegal abortions. This must have been financially a more rewarding business because, on her earnings, she managed to bring up three children, a daughter Janet, the defendant, and a younger daughter Irene. Even after this, she managed to save enough money to buy some property.

In 1960, she purchased a semi-detached house at 25 Tham Soong Avenue ('the Tham Soong property') for \$19,000 and rented it out to the British Forces in Singapore for \$350 per month. This earlier property which she purchased is not the subject of dispute, but plays a part in the defence put forward by the defendant to her claim in this action. In 1965, the plaintiff purchased another property, a new two-storey terrace house at 28 Jalan Novena Selatan ('the Novena Selatan property'), which is the subject of this action, for \$36,000. She paid \$10,000 as a deposit and the balance of \$26,000 was financed by a mortgage loan from The Great Eastern Life Assurance Co Ltd. The mortgagee required a younger person with a steady income to be included as an additional owner, and accordingly the property was registered in the names of both the plaintiff and her daughter Janet,

A the only one of her children who was of age at that time and who was by then already a teacher. As in the case of the Tham Soong property, she rented out the Novena Selatan property for a couple of years, before she moved her family into it in 1967.

B But her straying from the path of conventional midwifery has caused her problems which have largely contributed to the present action. In 1959 or 1960, she was convicted of carrying out illegal abortions, and was sentenced to imprisonment for six months and fined \$1,000. While in prison, she had visits from all her children who had been parked with various relatives during their mother's absence. When she came out, however, she apparently continued to carry out illegal abortions; she had to resort to this because she had three children to support and no other means of income. So in 1966 or perhaps in 1967, she was investigated again by the police, in the course of which her identity card was taken from her by the police.

D It is not clear why the identity card was taken from her, or whether there would have been any difficulty at all in her getting it back if she had asked for it, once the police was done with it. It is clear, however, and is common ground, that for a long time nothing was done to get back the identity card from the police, and the loss of her identity card and the police investigations had a traumatic effect on her mind. She became very afraid of the police, and was very apprehensive of being arrested. This fear preyed on her mind and appears to have dramatically affected her attitude to life and her everyday behaviour. F The defendant himself gave some graphic illustrations of this in his evidence. He was 21 at the time and recalled various incidents — his mother escaping out of the back door when police officers called at their home in Rangoon Road to see her, her running off to hide in a kampong in Chua Chu Kang, her working as a maid servant in Serangoon Garden Estate, and her disguising herself by wearing sunglasses and shielding herself under an umbrella whenever she went out. This paranoia appears to have lasted for many years.

H When the Novena Selatan property was purchased, there was a slight delay in the completion of the terrace house on it, but eventually the whole family moved into it in 1967. In 1969 Janet got married in the house, and her husband also moved in. Janet and her former husband Lee Hai Pey occupied one room, Irene and an aunt (whenever she was there) occupied a second room, and the plaintiff and the defendant both shared the third room, while the remaining room was rented out to a tenant. There had already been some friction between Janet and the defendant after her first child arrived and her family needed two of the rooms. By the time Janet had her second child in 1972, the Novena Selatan property had finally become much too small for all of them to continue living together in harmony. Consequently, Janet and her husband moved

over to the Tham Soong property, which was then vacant, paying the plaintiff the same rent of \$350 pm as the previous tenant.

Some months later, probably in 1974 and because the defendant had been urging the plaintiff to increase Janet's rent to \$600 pm, she arranged to buy the Tham Soong property from her mother. There are different versions of the purchase price and how it was paid, but it is most likely that the effective total consideration was \$50,000. Once again a loan was obtained from The Great Eastern Life Assurance Co Ltd in the form of a cheque for \$40,000 which was handed to the plaintiff, and \$10,000 was paid to the mortgage loan account of the Novena Selatan property to pay off the balance of the loan. On receiving the cheque for \$40,000, the plaintiff handed it over to the defendant to keep the money for her in his bank account. She did this rather than open an account in her own name, because she did not then have an identity card. He placed the cheque instead in a joint savings account which he opened with her at the Standard Chartered Bank. For all practical purposes thereafter, the passbook was at all times in the control of the defendant, who took it upon himself to operate the joint account to the exclusion of the plaintiff. The credit balance left now in the account is only \$30.47.

It was around this period and against this background that the Novena Selatan property was transferred to the defendant in 1974. No payment was made by him, and the transfer instrument recited that it was in consideration of natural love and affection. It was executed by both the plaintiff and Janet as co-owners, Janet joining freely in the transfer at her mother's request as she had always considered her mother to be the real beneficial owner. The solicitors who attended to the transfer took instructions from the plaintiff, and explained the meaning and implication of the transfer before the instrument was executed. Although the plaintiff was the transferor, the costs of the transfer, including stamp duty, registration and legal fees, were paid by the defendant out of the \$40,000 the plaintiff had previously handed over to him.

The plaintiff alleges that in fact the transfer of the Novena Selatan property only happened because of her problems at the time with the police and the detention by them of her identity card. Taking advantage of her personal circumstances and her frame of mind, the defendant had suggested to her that if she was arrested again the property could be confiscated, and the defendant had advised her that to protect the property she should transfer it to him temporarily. The Novena Selatan property was accordingly transferred to the defendant, but only on the condition, accepted by the defendant as transferee, that he would transfer back the property to her when she got back her identity card; until this happened, or if the identity card was not returned, she would be allowed to

A remain in occupation of the property, if necessary, for the rest of her life. At that time, as was the case with the \$40,000, she trusted him completely. She had explained all this to Janet, who as a co-owner had to execute the transfer together with her, and she had also told this to a brother Willie who is now deceased. Janet's evidence was that she herself was not sure about the risk of confiscation, but at that time she too believed in her brother. The transfer of the property to the defendant was then carried out.

Some time in 1978, the plaintiff did get back her identity card after the police had dropped all charges against her. Following this, she asked the defendant to re-transfer the Novena Selatan property back to her. According to her, he agreed to do so at first, but avoided doing anything about it; he would stall whenever it came to going to lawyers to translate his agreement into action, and eventually he refused to effect a retransfer at all. Over the years, he was asked again and again, not only by the plaintiff but by a couple of relatives and a lawyer friend of the family in Johore Bahru, but continued to refuse a retransfer.

The defendant denies that the Novena Selatan property was transferred to him on these conditions, and claims that it was an outright gift inter vivos, being the free and intelligent act of the donor, as in *Hooi Cheng Kwong & Anor v Paul Hooi*.¹ According to him, the plaintiff decided in 1974 to deal with her property assets, and two 'options' were proposed for consideration. One option was for Janet to purchase another house and use the rental from the Tham Soong property to pay for the new house. The other option was of the plaintiff to transfer the Tham Soong property to Janet at a reduced price of \$40,000 and to transfer the Novena Selatan property to him as a gift. This version of events was totally denied by the plaintiff, however, and also by Janet, whose evidence was that the transfer to the defendant of the Novena Selatan property was arranged by the defendant only after the sale to her of the Tham Soong property, and was an entirely separate transaction.

While the imposition of the condition on the transfer of the Novena Selatan property is denied by the defendant, it is not disputed that, after the transfer of the property and for a long time, until 1984, there was no material change in the circumstances of the property, or the existing arrangements for it. The plaintiff continued to be the only member of the family who continued to live in it. Janet had moved out to the Tham Soong property in 1972, and Irene moved out on her marriage in 1975. The defendant himself was no longer living there, and only visited the house occasionally, when he said that he cut the grass in the small garden; it later transpired that he had become a Muslim, had quietly married an Indonesian lady in 1972, and was bringing up his own family elsewhere.

During this period, and until 1984, to all intents and purposes, the plaintiff continued to exercise all the rights and privileges and to discharge all the duties and responsibilities of ownership. She continued to put out spare rooms to rent, and she continued to collect rent from them, certainly until 1984 and probably until 1986, when she no longer found it possible to live in the house, and this suit was commenced. And throughout this period she continued to pay the property tax, the PUB bills for utilities, the telephone bills and all the other outgoings of the house.

On his part, the defendant appears to have taken little or no personal interest in the Novena Selatan property until a very late stage in this unhappy saga, and, apart from the disputed transfer of it to him, his involvement with it was tenuous at best. Although he claimed in his evidence that, until 1974, he had shared the use of a room in it with the plaintiff, he had in fact been married in 1972 and was thereafter living with his wife in an HDB flat elsewhere.

In 1984, however, the defendant moved back to the Novena Selatan property, and brought his own family back with him. It appears clear that, with the new situation, friction arose and escalated from this moment onwards. Although a tenant still lived there, the plaintiff herself found it increasingly difficult to live in the same house with the defendant. He is accused by Janet of having forced his mother to sleep on the floor. He is even accused by the plaintiff of having thrown out the ancestral tablets of her husband and her father. As a result, the plaintiff frequently visited and stayed with her younger daughter, Irene and her own sister. At one time she also got Janet to come back to keep her company. On returning home after one of her outside visits in 1986, while Janet was on vacation in Hong Kong, the plaintiff found that the defendant had cleared all her personal belongings from her room. According to the plaintiff, the defendant told her he wanted to rent out her room, and had hired a small lorry for \$25 to cart her things away. She asked for the return of the Novena Selatan property. He refused, and, according to her, told her to 'get out'. She finally decided to resort to legal action.

In this case, the main issue was really the Novena Selatan property: was it really transferred to the defendant as a gift, in consideration of natural love and affection, or was it transferred to the defendant only on the condition, which he accepted at the time, that the property was to be returned to her when she got back her identity card, or, in other words, that the property was only to be held by him as a trustee of the property for her use and benefit during her lifetime and to be retransferred back to her, and the trust to be terminated, if and when she got back her identity card. There was a direct conflict of evidence on this issue. As the evidence related to events

A which took place in some cases some 25 years ago, it must only be expected that memories and recollections have been blurred to some extent by the passage of time, and that some at least of the evidence on either side must be treated with caution for this reason alone. But the evidence for the two parties is in such stark contrast that a court, in deciding between them, has little alternative but to choose between them and to come down on one side in preference to the other. The issue then resolves itself into a question of credibility, as to which version is the more probable of the two, the credibility to be tested further against the reason and logic of the evidence presented.

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C On this main issue, and notwithstanding the caveat I have referred to, I have had no hesitation in accepting the evidence of the plaintiff as being the correct version of the background and reason for the transaction over the Novena Selatan property. She had the more difficult story to tell the court, but she told it simply and, in my opinion, truthfully. As a result of her personal problems with the police and the loss of her identity card, whether or not her distress was justified, the defendant's own evidence showed that for a long time she was clearly in such a distressed frame of mind that she could have been easily persuaded to transfer her remaining property on trust to the defendant to avoid losing it altogether; but none of the evidence could be shown on closer examination to provide any reason for her to go so much further as to make the defendant a gift of the property. In this context, Mrs Tan referred the court to the Privy Council case of *Yew Phaik Hoon v Quah Ooi Keat & Anor*² and to *Ksenia Otremsky v Alexander Otremsky*.³ It was true that the plaintiff did not explain her whole plan to the solicitor who attended to the transfer, but this was perfectly understandable. Having regard to the real reasons for the transfer, it would have been more than unnatural for her to unfold the whole story to anyone outside her close family, even though he be the solicitor acting for her in this isolated transaction.

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G One point said to be against the plaintiff, to which my attention was drawn by Mr Singham, was that, if her story was true, she waited for almost an inordinately long time before taking legal action, and her claim should be barred by laches, for her delay in asserting her right, and he cited *Allcard v Skinner*.⁴ Her explanation for this, which I accept, was that for a long time the defendant did not actually refuse to retransfer the property, but was successfully stringing her along. Later she became frightened to approach him because he would become difficult whenever she raised the subject, and she preferred to enlist the help of others to try and resolve the matter. Janet now clearly despises the defendant, and her own evidence was marred by one glaring exaggeration in her first account of how, on her return from a vacation in Hong Kong in 1986, she found that her mother's belongings had been thrown out from her room, an exaggeration for which she later apologized to the court. I was of the opinion, however, that

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she was essentially a truthful witness and that she fully corroborated the plaintiff's evidence on all its main aspects.

The defendant's evidence, on the other hand, was unsatisfactory; at best, it raised more questions than it supplied answers. Some of it turned out to be no more than a hotch-potch of inconsistencies and contradictions. This was because he was inclined to be evasive and to avoid giving direct answers. In watching his demeanour and his responses as he gave his evidence, I became more and more convinced that he was not telling the whole truth about the circumstances in which the Novena Selatan property was actually transferred to him. He was described by Janet's former husband, Lee Hai Pey, as someone who was not a greedy person, who did not seek wealth, who was not ambitious, and was altogether a simple person. He may well have been all these when Lee was living with the family in the very early '70s, but that was a very long time ago and it was clearly a very different person that Lee knew. In the witness box in court, a very different personality showed through, of a person who knew that the property did not rightfully belong to him, but had grown over the years to cherish the thought of owning it, until he believed that as the only son it should be his by some right of primogeniture, and was therefore now determined somehow to cling to it at all cost. He had exercised no proprietary rights whatsoever over the property between 1974 and 1984 and to all intents and purposes had lain low, as it were. Now, after waiting for ten years, he was asserting his ownership; one reason for the apparent volte-face might have been in the mistaken belief in the family, which surfaced during Lee's evidence, that a gift of property could not be revoked after ten years, and would become absolute and irrevocable.

Janet's former husband, Lee, turned up at the hearing to give evidence in support of the defendant. It was he who introduced the plaintiff to a lawyer, and it was he who accompanied the plaintiff and Janet to the lawyer's office to do the transfer of the Novena Selatan property. He testified that he had the impression all along that the property was meant as a gift to the defendant. However, it turned out in cross-examination that it was only at the lawyer's office that he learnt for the first and only time that it was a gift, and he repeatedly insisted throughout his evidence that he knew nothing else about the family's affairs, as he had scrupulously avoided being involved in them at all times. Although he was the only witness who might be said to have no interest in the outcome of the action, he was, in my opinion, no more privy to the plaintiff's real intentions for the Novena Selatan property than was the lawyer, and his evidence had to be discounted.

If the passage of time has blurred memories and recollections over the Novena Selatan property, its im-

A pact was no less on the money which the plaintiff handed over to the defendant to keep for her. That the joint account was opened and subsequently operated solely by the defendant was not in dispute. What was disputed was the instruction or authority which the plaintiff gave the defendant at that time as to whether or not he could use the money, in what circumstances, and how. According to the plaintiff, he was to return the money when she got back her identity card: until this happened, or if this did not happen, he was to continue to keep the money for her for her old age. There was no suggestion at all that he could use the money. The plaintiff's evidence on this point was corroborated by Janet. According to her, the plaintiff said she had no identity card, so the defendant offered to deposit the money for her and he would return it when she had an identity card. At that time, the plaintiff trusted the defendant completely.

In his evidence, the defendant could only recall that the cheque was for \$30,000 apparently overlooking the fact that in his amended defence, redelivered as recently as 24 August 1988, he had stated that he and the plaintiff 'had jointly opened a bank account to the sum of \$40,000'. He denied that the plaintiff had ever told him to keep the money for her for her old age. On the other hand, however, he was unclear as to what instructions, if any, the plaintiff had given him. His evidence on this point in a lengthy cross-examination was confined to trying to create a general impression that, at that time at least, he was the person who was in control of the plaintiff's and the family's financial affairs. Accordingly, as and when he needed money, he used the money from his own account or from the joint account with the plaintiff, without distinction; but he claimed that on each and every occasion that he used money from the joint account it was with the plaintiff's consent. Thus, in 1974 he had spent \$4,224.50 to pay legal fees for her; in 1975, he had spent \$3,000 for her 55th birthday celebration dinner at the Neptune Theatre and Restaurant; and in 1977, on her instructions, he had given \$9,000 to the younger daughter Irene to help with the purchase of a flat; even before that he had, again on her instructions, given Irene \$3,000. He apparently did not keep track of any of the drawings, and could not recall how the rest of the money had been spent, although by now there was practically nothing left of the money. The plaintiff denied that any of those payments had been authorized, much less instructed, by her.

In my judgment, there can be no doubt that the \$40,000 was handed over to the defendant for the purpose alleged by the plaintiff. This event occurred in the same period of time as the transfer of the Novena Selatan property, when the plaintiff had her problems with the police and her identity card had been detained. For all practicable purposes after the joint account was opened, the passbook was at all times in the control of the defendant and he had taken it upon himself to operate the joint

account to the exclusion of the plaintiff. That being so, the defendant was in fact in the position of a trustee for the plaintiff in respect of this money, and was under a fiduciary duty to preserve it in accordance with the terms of the express trust imposed on it, which he had accepted. Instead of this, he appears to have gone about spending it blissfully, as if it were his own, without even bothering to keep an account which he had a duty to do. Neither has he tried at any time to prove the payments which he has alleged were made with at least the acquiescence of the plaintiff. In my judgment, he must return to the plaintiff \$35,755.50 being the \$40,000 less only the \$4,224.50 which was paid for the plaintiff's legal fees.

In my judgment, therefore, the defendant was a trustee for the plaintiff of the Novena Selatan property and the money in the joint account. These were not constructive or resulting trusts imposed by the law, but were simple express trusts which the plaintiff as settlor created orally for her own benefit, with a provision for revocation; in the event of her death (before the identity card was returned to her), the defendant having accepted trusteeship would not have benefited personally but would have had to hold on trust for the deceased's estate. As in the older cases of secret trusts for mistresses and illegitimate children, secrecy or confidentiality often create problems of proof, where secret acknowledgments by trustees have not been preserved. Fortunately, in the instant case, evidence is still available from the plaintiff herself, and from her daughter Janet.

Having come to these findings, the consequential order in respect of the Novena Selatan property will be that the defendant shall execute within 14 days all necessary documents to retransfer his present right title and interest in the property to the plaintiff; in default of the defendant doing so, the Registrar of the Supreme Court shall execute all such documents, including any certificate which may be required under the Land Titles Act, in the name and on behalf of the defendant. The costs and expenses of the retransfer should be borne by the plaintiff. In respect of the \$40,000 which was originally handed by the plaintiff to the defendant, judgment shall be entered for the plaintiff for the sum of \$35,775.50 together with interest thereon at the rate of 6% pa from 28 July 1986 to the date of judgment. The plaintiff should also have her costs.

Application allowed.

Solicitors: *Ann Tan & Associates; Rodyk & Davidson.*

Reported by *Terence Tan Bian Chye*

A **Pedac Holdings (S) Pte Ltd v First Noodle Shop Pte Ltd**

HIGH COURT (SINGAPORE) — SUIT NO 1235 OF 1989
YONG PUNG HOW J
28 FEBRUARY 1990

B *Landlord and Tenant — Rent fixed and variable depending on sales of tenant above minimum amount — Whether minimum rent included maintenance charges — Evidence Act (Cap 97, 1985 Ed), ss 93 & 94 — Evidence Act 1950 [Mal], ss 91 & 92*

Evidence — Parol evidence rule — Exceptions

C This was an appeal by the defendants to a judge-in-chambers under O 56 against the decision of a registrar ordering in favour of the plaintiffs possession and delivery up of premises, and payment of arrears of rent, mesne profits, maintenance charges, interest thereon and costs. The plaintiffs are the owners of the premises ('the premises'). By a lease in writing, the premises were let to the defendants for the business of a restaurant for a term of three years. The rent was made up of two elements: a fixed minimum rent of \$4,000 per month, and a percentage rent which was the amount by which 10% of the defendants' monthly gross sales exceeded the fixed minimum rent payable for the month. The defendants covenanted under the lease to pay the maintenance charges which were later fixed at \$6,000 per month; also to pay interest on any arrears of rent at 10% pa from the due dates to the date of payment or recovery, with such interest to be treated as arrears of rent. The defendants alleged in essence that the lease did not correctly represent the terms agreed between the parties because, in the negotiations before the execution of the lease, other collateral terms had been agreed to. In particular, the fixed minimum rent was not \$4,000 per month, but was \$10,000 because it included the maintenance charge of \$6,000 per month. The implication of this was that it would only be over this higher threshold that the percentage rent would be calculated. The defendants contended in effect that the amount of the maintenance charges should be included in the formula, and added to the fixed minimum rent to raise the threshold beyond which the percentage rent is to be calculated.

G **Held**, dismissing the defendant's appeal:

(1) On the issue whether the defendants' case fell within exception (c) to s 94, the court found that the defendants' claims do not go so far as to prove the existence of a separate oral agreement.

H (2) The only reasonable inference to be drawn from them is that the formula for the payment of rent was discussed before the lease was executed, as would only be expected, and the terms of the tenancy as set out in the lease reflected the final consensus between the parties. The court could not accept the defendants' suggestion that the rent stated in the lease did not reflect what the parties had allegedly agreed to orally, and should have been vastly different and included the maintenance charges.

I [Editorial Note: The defendants have appealed to the Court of Appeal vide Civil Appeal No 8 of 1990.]

Cases referred to

- 1 *City and Westminster Properties (1934) Ltd v Mudd* [1959] 1 Ch 129 (distd)
- 2 *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (distd)